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No. 06-1188

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IN THE

# Supreme Court of the United States

TECK COMINCO METALS, LTD., a Canadian corporation,

*Petitioner*,

*v.*

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## SUPPLEMENTAL BRIEF FOR RESPONDENTS PAKOOTAS AND MICHEL

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Respondents, Joseph Pakootas and D.R. Michel, concur with the view of the United States that the current posture of this case "counsels strongly against this Court's review." Brief for the United States as Amicus Curiae ("Brief of the United States") at 6. Respondents submit this brief pursuant to S.Ct. Rule 15.8 for the sole purpose of commenting on the mootness and vacatur issues discussed in the Brief of the United States.

A suggestion of mootness at this stage is anomalous because petitioner, Teck Cominco Metals, Ltd. ("TCM"), has not claimed that its agreement with the Environmental Protection Agency ("EPA") moots this appeal. Instead, TCM advised the court of appeals that "claims for civil penalties under CERCLA 'for each day' of violation of the Unilateral Administrative Order are not moot . . . [and] claims for attorneys' fees in trying this lawsuit are not moot. . . ."[1] As no court has analyzed TCM's agreement with EPA or considered its effect on this citizen suit, any mootness concerns should be considered by the district court after remand. The petition for Writ of Certiorari should be denied.

## SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' complaint sought declaratory and injunctive relief under CERCLA based on TCM's failure to comply with the unilateral administrative order ("UAO") issued by EPA on December 11, 2003. Pet. App. 6a, 105a-12a. Their complaint also sought an order requiring the payment of civil penalties to the maximum extent permitted by CERCLA "for each day during which the violation of the UAO continues," pursuant to 42 U.S.C. § 9659(c) and recovery of attorneys' fees pursuant to 42 U.S.C. § 9659(f). Pet. App. 111a.

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[1] Petitioner's Request for Judicial Notice, Ninth Circuit Court of Appeals ("Pet. C.A. Request for Judicial Notice") <http://www.law.washington.edu/ Directory/docs/Robinson-Dorn/Trail Smelter> at 5.

Neither the United States nor TCM has argued that respondents lacked standing to sue or that they failed to meet the requirements for a citizen suit stated in 42 U.S.C. § 9659. As the United States recognizes and TCM does not dispute, TCM did not comply with the UAO. Brief of the United States at 3, Pet. App. 5. TCM has never complied with the UAO. Instead, it moved to dismiss respondents' complaint alleging lack of subject matter and personal jurisdiction and failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(1), (2) and (6). Pet. App. 30a. After the district court denied that motion, Pet. App. 29a-59a, and oral argument on its appeal, TCM negotiated an agreement with EPA. Pet. App. 9a n.10. Respondents are not parties to that agreement and it does not purport to release the claims that respondents allege in their citizen suit.[2] Instead, it provides for implementation of a remedial investigation and feasibility study (RI/FS) patterned on the UAO, but which explicitly disclaims compliance with an "administrative or judicial order issued pursuant to the provisions of CERCLA . . ."[3] Pet. C.A. Request for Judicial Notice, Ex. 2, at 1, 3 (June 2, 2006).

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[2] CERCLA authorizes the United States to intervene in this citizen suit, 42 U.S.C. § 9659(g), but it has never done so. Nor did it file suit against TCM or negotiate a judicial order requiring TCM to comply with the UAO or otherwise comply with CERCLA.

[3] The settlement agreement is structured like a CERCLA order but stripped of its CERCLA grounding. Settlement Agreement at 1-29. A comparison of the settlement agreement's Statement of Work (SOW) with the original UAO's SOW reveals that the settlement agreement includes similar components as the UAO. *Id.*, Ex. A at 1-49 (June 2, 2006) (Statement of Work for Remedial Investigation and Feasibility Studies Upper Columbia River Site); Petitioner's Memorandum in Support of Motion to Dismiss, with Exhibits, Ex. A at 58-77 <http:// www.law.washington.edu/ Directory/docs/Robinson-Dorn/ Trail Smelter>.

As a part of its agreement, EPA agreed to withdraw the UAO and covenanted "not to sue or to take administrative action against TCM and TCAI[4] pursuant to Sections 106 and 107(a) of CERCLA, . . . for non-compliance with the Unilateral Administrative Order. . . ."[5] *Id.* at 22, 55. This promise was expressly conditioned on "the satisfactory performance by TCAI and TCM of their obligations under" the agreement. *Id.* The settlement agreement did not purport to release any claims for past non-compliance with the UAO and it did not purport to terminate the pending citizen suit. Nor did EPA promise to take any action to accomplish termination of the pending citizen suit. Indeed, the agreement expressly rejected its application to the rights of third parties. *Id.* at 26, ¶74.

As TCM concededly did not comply with the UAO, and it did not reach agreement with the EPA until 892 days after suit was filed, daily penalties for non-compliance with the UAO could be awarded under 42 U.S.C. § 9659(c). At the maximum rate of $27,500 per day, 42 U.S.C. § 9606(b)(1) and 40 CFR 19.4, TCM is potentially liable for penalties totaling $24,530,000. If penalties are awarded by the district court for non-compliance with the UAO, respondents will seek recovery of their attorneys' fees and costs as authorized by 42 U.S.C. § 9659(f).

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[4] TCAI is Teck Cominco American Incorporated, an affiliate of TCM.

[5] Any compromise of a unilateral administrative order to conduct an RI/FS under CERCLA is subject to 42 U.S.C. § 9622(d)(3) and is to be implemented by administrative order or decree in the district court. EPA did not follow these procedures, evidently concluding that it was not resolving any claims under CERCLA.

After it reached agreement with the EPA, TCM did not ask the district court or the appellate court to dismiss this citizen suit on mootness grounds. Instead, TCM asked the Ninth Circuit to take judicial notice of the settlement agreement and represented that the appeal was not moot. Pet. C.A. Request for Judicial Notice, Pet. App. 9a, n.10. It claimed that the settlement agreement mooted the injunctive and declaratory relief claims but stated its understanding that its agreement with EPA did not moot the statutory penalties and attorneys' fees claims. *Id.*

## DISCUSSION

### A. Post-Suit Withdrawal Of The UAO In A Non-CERCLA Agreement Does Not Automatically Moot Respondents' Citizen Suit, And Application Of This Court's Mootness Principles Requires Remand To The District Court For Factual Inquiry.

CERCLA authorizes respondents to commence a civil action against TCM based on its violation of an "order which has become effective" at the time of suit. 42 U.S.C. § 9659(a)(1). Such right to commence suit is conditioned on notice pursuant to subpart (d)(1) and the absence of diligent prosecution by the government as provided in subpart (d)(2). As TCM's non-compliance is conceded and diligent prosecution is not alleged, respondents not only had standing to sue when they filed, TCM had no colorable defenses except the arguments it made—the court lacked subject matter and personal jurisdiction and CERCLA did not apply to an entity located in and operating in Canada.

The United States now suggests that its withdrawal of the UAO after TCM's non-compliance and unsuccessful challenge to the application of CERCLA, deprives respondents of a case or controversy because "petitioner is no longer violating [the order]." Brief of the United States at 8-9. This argument is not anchored in the text of CERCLA and does not distinguish

between a claim that has been potentially limited by subsequent developments and one that is no longer "live."[6] Withdrawal of the UAO may limit the district court's power to grant an injunction enforcing it, but does not, of itself, eliminate the court's power to order statutory penalties for the period of non-compliance. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). TCM recognized this when it told the Ninth Circuit that neither the penalties claim nor the attorneys' fees claim was moot. The United States cites no authority suggesting that the district court lacks jurisdiction to award penalties based on non-compliance with an order that was subsequently withdrawn; thus, it is not self-evident, as the United States has implied, that respondents' claims are moot.[7]

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[6] The United States discussed standing principles from *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). Brief of the United States at 8-10. Standing is not controverted here, and standing jurisprudence does not answer whether certain forms of relief remain available for post-filing violations. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-92 (2000) (distinguishing standing and mootness in voluntary compliance cases).

[7] As the United States agrees that there has been no voluntary compliance with the UAO by TCM that might have squarely placed these issues under *Laidlaw*, this Court's landmark voluntary compliance opinion, Brief of the United States at 10, there is a question of the applicable mootness standard to apply. The United States assumes that *Laidlaw* applies, reasoning backward from the proposition that in a voluntary compliance case penalties must deter future violations to conclude that claims for penalties can also be mooted in non-voluntary compliance cases. Reliance on *Laidlaw's* voluntary compliance analysis does not help in the instant case where TCM adamantly refused to comply with the order in question.

Contrary to the United States' assumption that the *Laidlaw* standard applies, withdrawal of the UAO, like repeal of a statute, does not deny the Court jurisdiction to decide whether relief should issue. *Coral Constr. Co. v. King County*, 941 F.2d 910, 927 (9th Cir. 1991) (citation omitted). When mootness is alleged in such circumstances, the court retains the power to decide the legality of the practice and whether relief should issue. *Mesquite*, 455 U.S. at 289.

Rather, the undeveloped status of the complex factual record giving rise to mootness allegations is best suited for resolution at the trial court. *See, e.g., Laidlaw*, 528 U.S. at 193-94 (remanding because the facts informing the mootness question "have not been aired in the lower courts; they remain open for consideration on remand"); *Mesquite*, 455 U.S. at 289 n.10 (it was a matter for the trial judge whether likelihood of further violations was sufficiently remote to make injunctive relief unnecessary); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199 (1968) (same).[8] This is so because the alleged mooting event is not simply the withdrawal of the UAO, as the United States suggests. Brief of the United States at 10. Instead, the potentially mooting event is the agreement between TCM and EPA, a 29-page document setting out the structure of a CERCLA-like RI/FS, relied upon by EPA as the basis for withdrawing the UAO. Settlement Agreement at 1-29. The United States has not cited authority suggesting that non-judicial action terminates a validly filed citizen suit.[9] But, even if the agreement to withdraw the UAO operates to moot injunctive relief, the district court must determine how, if at all, the settlement agreement applies to the remaining claims for

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[8] The lower courts also recognize that the determination of whether a citizen suit's claims for civil penalties have become moot is a highly factual inquiry. *See, e.g., Ass'n of Irritated Residents v. Fred Shakel Dairy*, 460 F. Supp. 2d 1185, 1192 (E.D. Cal. 2006) (In a Clean Air Act case, the effect of compliance and closure of a facility on civil penalties claims in a citizen suit was a "disputed factual matter"); *Natural Res. Council of Me. v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 257 (D. Me. 2006) (In a Clean Water Act case, the court noted that at an early stage of litigation, "without any further information," it could not determine whether civil penalties claims had become moot).

[9] While separate adjudications have terminated citizen suits under *res judicata* principles, *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472-74 (6th Cir. 2004), respondents are aware of no case in which a citizen suit, properly filed, has been terminated by non-judicial action. Nothing in the text of CERCLA authorizes termination of the suit in these circumstances.

penalties and fees—a question on which TCM and the United States evidently disagree. In addition to determining whether penalties should be awarded based on pre-withdrawal non-compliance, analysis of the agreement and its implementation is necessary to judge whether penalties would influence TCM's performance of the settlement agreement (necessary to prevent rescission of the UAO withdrawal) and deter other non-compliance with CERCLA.[10]

As part of its mootness argument, the United States suggests that EPA's covenant not to sue in the settlement agreement waived or released respondents' claim for penalties stated in the pending citizen suit. Brief of the United States at 11. EPA evidently did not intend to waive respondents' claims as the settlement agreement expressly excludes impact on the rights of third parties. Settlement Agreement at 26, ¶74. That provision recognizes the fact that respondents were not party to the agreement and EPA was not purporting to act on their behalf. In any event, waiver is an affirmative defense that might be alleged in the district court, not a ground for mootness. *See, e.g., Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665-66 (9th Cir. 1997) (recognizing that waiver is an affirmative defense that must be pleaded in an answer).

**B. EPA's Agreement With TCM Does Not Raise A *Res Judicata* Bar To This Suit; Any Claim To The Contrary Must Be Evaluated By The District Court On Remand.**

Within its mootness discussion, the United States briefly addresses the principles of *res judicata*, asserting that *res judicata* operates to "bar" respondents' citizen suit claims. Brief of the United States at 11. Although courts have occasionally applied *res judicata* principles to determine the

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[10] The deterrence and compliance calculus is complicated by the fact that TCM did not undertake performance of the RI/FS described in the settlement agreement. That responsibility was allocated to TCAI, TCM's American affiliate.

effect of a post-filing settlement, *see, e.g., Ellis*, 390 F.3d at 472-74, *res judicata* does not preclude litigation unless the prior action ended with a "final judgment on the merits" involving the same parties or their privies. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The two cases cited by the United States to support its view do not help overcome the absence of judicial resolution here. *Ellis*, 390 F.3d 461; *EPA v. City of Green Forest*, 921 F.2d 1394, 1403-04 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991). In both *Ellis* and *Green Forest*, the settlement alleged to have preclusive effect was the result of a judicial process in which the citizen suit plaintiffs either participated as intervenors or had an opportunity to comment on the proposed settlement. *Ellis*, 390 F.3d at 472-74; *Green Forest*, 921 F.2d at 1402. In contrast, here, respondents had no opportunity to participate directly in the extra-judicial settlement negotiations and no judgment was entered.

### C. Even If This Court Deems Respondents' Claims Moot, It Should Not Vacate The Ninth Circuit Opinion.

Vacatur is a doctrine grounded in the principles of equity. *See U.S. Bancorp Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("the determination [of whether to vacate] is an equitable one"). This Court vacates a lower court opinion when mootness arises in one of two circumstances: when mootness arises by "happenstance," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), or when the prevailing party below takes voluntary action to moot the claim, effectively preventing appeal. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944) (vacating lower court opinion was the "just and appropriate disposition" after prevailing party, a corporate entity, dissolved before its favorable judgment could be reviewed; Court vacated and remanded to allow losing party to pursue the corporate entity's successors). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a

favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment") (agreeing with the Brief of the State of Arizona) (alterations in original).[11] Neither justification for vacatur applies here, and vacation of the Ninth Circuit opinion would work directly *against* the equitable principles that the vacatur doctrine seeks to protect.

The primary purpose of vacatur is to protect the losing party from being prejudiced by a decision that might have been overturned on appeal. *See Munsingwear*, 340 U.S. at 40. There is no such concern here where TCM—the losing party on the issue appealed from the district court—first deliberately entered into a non-CERCLA settlement agreement without the participation of respondents, and then urged to the Ninth Circuit that the settlement agreement had not mooted respondents' claims for civil penalties and attorneys' fees. *Cf. Bonner Mall*, 513 U.S. at 28 (criticizing a vacatur theory that would encourage "the lack of equity of a litigant who has voluntarily abandoned review").[12] This Court has expressly established that vacatur is not appropriate where the appellant has voluntarily mooted the appeal, including by settlement. *Bonner Mall*, 513 U.S. at 24. *See also Laidlaw*, 528 U.S. at 194 n.6 (even if polluter's voluntary compliance mooted the citizen suit, it would be "far from clear" that vacatur would be the appropriate response).

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[11] This Court's opinions in *Deakins v. Monaghan*, 484 U.S. 193 (1988); *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981); and *Crowell v. Mader*, 444 U.S. 505 (1980); all inform that when only portions of a plaintiff's lawsuit have become moot, only the moot portions should be vacated. These opinions do not provide an additional basis for exercising the equitable doctrine of vacatur; they merely instruct *how much* of an opinion should be vacated when this Court determines that vacatur is warranted.

12. Nor is *Munsingwear's* concern regarding the foreclosure of opportunity for review presented here. *See Munsingwear*, 340 U.S. at 38. No judgment was entered below, and nothing precludes TCM from again seeking review in this Court should the applicability of ~~C~~ERCLA to TCM remain an issue in this case after remand.

"The denial of vacatur is merely one application of the principle that '[a] suitor's own conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Bonner Mall*, 513 U.S. at 25 (denying requested vacatur because the prevailing party voluntarily mooted the subject of the appeal through settlement, precluding further review) (citation omitted). Thus, there is no application here for *Munsingwear*'s observation that when mootness arises through *happenstance* vacatur beneficially "clears the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40. This Court has determined that when a party voluntarily moots a claim, the benefits of preserving the lower court's opinion outweigh any potential benefits of relitigating the same issues. *Cf. Bonner Mall*, 513 U.S. at 27 ("The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions") (emphasis added).

## CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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